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Labor Law--Unprotected Activities as Affecting Requirements of Union's Duty to Bargain

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position is precarious and uncertain. Further, it requires the applicant to determine what ailment is major and which is minor, a situation which to one other than a physician would be to a large extent conjecture. Probably the least desirable result would be that the applicant would no longer be able to place his confidence in the agent as he should be able to.

It seems to the writer that the rule under which this state has brought itself does not recognize the real nature of an insurance policy. The applicant and the agent are not involved in a bargain and sale type negotiation in which each party tilts with the other in order to obtain the advantage. But they are rather in a relationship of confidence as indicated by the language of one of the major company's advertisements, "Consult your agent as you would your attorney or physician". The extent to which the applicant may rely upon the statement of the insurance company's representatives is not a new question in this state. In 1936 the Supreme Court in the case of *Dickenson v. Pacific Mutual Life Ins. Co.*, 117 W. Va. 812, 188 S.E. 378 (1936), posed the following question: "Does the insured, who relies upon the information and opinion of a company medical examiner, do so at his peril?" Since the point was not briefed, the court supplied no answer, but, if driven to its logical conclusion, the only answer one may discern from this latest pronouncement would necessarily be in the affirmative.

J. G. V. M.

LABOR LAW—UNPROTECTED ACTIVITIES AS AFFECTING REQUIREMENTS OF UNION'S DUTY TO BARGAIN.—The union, representative of insurance agents, while negotiating collective agreements with the employer, sought to bring economic pressure upon the employer by having its agent-members engage in concerted on-the-job activities, such as—refusing to solicit new business, reporting late at offices, and absenting themselves from special business conferences arranged by the employer—designed to harass the employer. The employer charged the union was refusing to bargain collectively; whereupon the Board entered a cease-and-desist order against the union. The circuit court set aside this order. On certiorari, the Court *held* that the union's duty to bargain collectively in good faith did not bar it from bringing to bear on the employer harassing tactics of this nature and that their use by the union was of no evidentiary significance. Justice Frankfurter, concurring, agreed that

the finding of bad faith was not supported solely by the showing of the union's unprotected activities, but would have remanded the case for reconsideration by the Board, permitting the Board to consider such activities as relevant, but not controlling, evidence of bad faith bargaining. *NLRB v. Insurance Agents' Int'l,* 80 S.Ct. 419 (1960).

The principal case, more popularly denoted as the *Prudential Insurance* case, involved a question concerning a union's duty to bargain collectively with an employer. This is a statutory requirement of Section 8(b)(3) of the National Labor Relations Act, as amended. 61 Stat. 141 (1947), 29 U.S.C. § 158 (b) (3) (1952). This section of the amendment, Labor Management Relations Act (Taft-Hartley Act) was added in 1947 to correspond with Section 8(5) of the N.L.R.A. (carred forward by the Taft-Hartley Act as Section 8 (a) (5), *supra,* which placed a like responsibility upon the employer.

The original N.L.R.A. contained no test for determination of what constituted bargaining collectively between the parties. The Board and the courts, however, defined the obligation by development of the "good faith" rule. E.g., *Singer Mfg. v. NLRB,* 119 F.2d 131, 134 (7th Cir.), *cert. denied,* 313 U.S. 595 (1941). With the adoption of the Taft-Hartley Act, Congress expressly defined bargaining collectively as the obligatory duty to bargain in good faith in regard to wages, hours, and working conditions. § 8(d), *supra.*

Certain activities, engaged in by unions during contract negotiations to apply economic pressure against the employer, have been the subject of a recent line of cases prosecuted under Sections 8(b)(3) and (d) of the Act. Unprotected activities are those types of economic pressures which are neither protected by falling within the scope of Section 7 of the Act nor prohibited expressly by any other provision of the Act. *International Union, UAW v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949). When employees engage in such activities, they lose the protection of the Act and their employer may discharge them and need not rehire them when the dispute is settled. *G. C. Conn v. NLRB,* 108 F.2d 390 (7th Cir. 1939). Illustrations of the type of activities or practices objected to are to be found in the examples set out in the abstract of the principal case, where the agent members' "Work Without a Contract Program," in effect a type of slowdown, resulted in the disruption of Prudential business. In *Textile Workers*

v. N.L.R.B., 227 F.2d 409 (D.C. Cir. 1955) (the *Personal Products* case), the company and union had been deadlocked over negotiations for a new contract. In order to force the employer to come to terms, the union conducted a series of harassing tactics including refusal to work overtime, unauthorized extensions of rest periods, slowdowns, and unannounced recurring walkouts. In *United Mine Workers v. NLRB,* 258 F.2d 146 (D.C. Cir. 1958) (the *Boone County* case), similar activities were engaged in during negotiations.

These cases present the issue whether union members engaged in unprotected activities during bargaining constitute violations of Sections 8(b)(3) and (d) of the Act. That there are at least three approaches to this problem is evidenced by as many views set out in the solutions to be herein reviewed.

The first of these approaches, is the "per se" test now written off by the Court's holding in the *Prudential* case. In 1954, when first faced with the problem of the use of unprotected activities within a bargaining context, the Board affirmed the trial examiner in the *Personal Products* case, *supra,* finding violations of Sections 8(b)(3) and (d) of the Act. *Textile Workers Union,* 108 N.L.R.B. 743 (1954), *enforced in part, set aside in part,* 227 F.2d 409 (D.C. Cir. 1955). The Board apparently relied heavily upon its prior decision in *Phelps Dodge Copper Corp.*, 101 N.L.R.B. 360 (1952), where it was held that similar union activity relieves an employer from his duty to bargain with the union. However, the *Phelps Dodge* case did not hold that such activity constituted absence of good faith for the purpose of finding a refusal to bargain. The *Personal Product* decision expanded the concept of good faith by characterizing the use of the activities as an abuse of the union's bargaining powers disruptive of the bargaining process Congress intended to protect. It should be noted that the decision did not explicitly hold that mere engaging in unprotected activities constituted a per se violation of duty to bargain.

In the second decision, the *Boone County* case, the trial examiner based his decision primarily on the *Personal Products* case, and the Board affirmed, there expressly stated, and apparently for the first time, that engaging in "an activity unprotected by the Act . . . occurring in a bargaining context . . . [violates] Section 8(b)(3)" *United Mine Workers,* 177 N.L.R.B. 1095, 1097 (1957), *rev'd,* 258 F.2d 146 (D.C. Cir. 1958). This then was the development of the "per se violation" doctrine which bottomed the Board's decision in the *Prudential Insurance* case.

The same federal circuit court reversed both the *Personal Products* and the *Boone County* cases on this point on the basis that Congress did not intend for the Board to intrude upon the substance of collective bargaining. This interpretation of the Act had been previously expounded in probably the best summation to date of the good faith bargaining concept in a landmark opinion by Vinson, C. J. *N.L.R.B. v. American Nat'l. Ins. Co.*, 343 U.S. 395 (1952) (where it was held that employer's bargaining for a management perogative's clause was not per se an unfair labor practice).

To have permitted the Board's intrusion into the bargaining context by placing prior limitations upon the forms of economic pressures permissible would have been to place specific objective tests upon the factor of good faith in each particular case. The Board's action would have legislated a frame of mind, where actual response to the proposals of the opposing party would not be considered, no matter how well intentioned, if the activities were engaged in. At present, and it is hoped in the future, the test to determine whether the parties have bargained collectivly has been a subjective one gathered from all the factors affecting each case as it arises. Cox, *The Duty to Bargain In Good Faith*, 71 HARV. L. REV. 1401, 1440 (1957-58).

Another criticism which may be leveled at the Board's attempt to regulate conduct of the negotiations by the "per se" test is that it would create regulation on the basis of relative bargaining power. This is to say that the steps once taken, the Board would be called upon time and again to declare the tactics of pressure used by the stronger party to be unfair merely because they are unprotected by the Act. This would appear to upset prior decisions which have left the remedies to the parties, e.g. *G. C. Conn v. NLRB, supra*, (where employees were permanently discharged for engaging in unprotected activities), and those left to the enforcemnt of state courts, e.g. *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942) (where it was held that Congress left open the control of labor violence to the states). It is apparent that the court in the *Prudential Insurance* case based its repudiation of the "per se" doctrine in part to correspond to prior decisions in the area national-state jurisdiction. The court also recognized that even though brute force alone has given way to more sophisticated bargaining forms, the results of negotiations still are governed by the principle that power begets the substance of the settlement. To force a departure from the prevailing mode before the parties

have developed a substitute for the interplay of economic pressures, would only sound the clarion call for increased government intervention in this narrow area heretofore preserved to the parties.

The second approach to harassing tactics and their relation to the good faith bargaining requirement was just the opposite of the "per se" test and held that the use of such tactics had no probative relevance on a charge of refusal to bargain in good faith. In reversing the Board the circuit court in the *Personal Products* and the *Boone County* cases held that unprotected activities used in the bargaining concept did not raise the slightest inference of refusal by a union to bargain in good faith.

The Supreme Court in *Prudential* states that, ". . . the two factors—necessity for good faith bargaining . . ., and the availability of economic pressure devices to make the other party incline to agree . . . —exist side by side. . . ."

In view of present policies the truth of this statement cannot be denied. However, to hold that the use of such activities is of no evidentiary significance and cannot be weighed by the Board is to reduce the requirement to bargain collectively in good faith to a sterile concept. It may be termed sterile because duty of "good faith" is limited by this holding only to occurrences at the bargaining table. The spirit of the Court's decision is to be praised for reversing the trend adopted by the Board which would have placed the NLRB in a third seat at the bargaining table, but it may be questioned whether its application as a general rule would produce the desired result in practice. For example, it is foreseeable that threats of violence by the union, e.g. *Youngdahl v. Rainfair*, 335 U.S. 131 (1957), or the retaliation of the employer by lockout during negotiations to force a settlement, e.g. *NLRB v. Truck Drivers Local*, 353 U.S. 87 (1957), could be certainly indicative of merely going through the motions of bargaining while entertaining no intention of agreement.

The third approach, expressed in the concurring opinion of the *Prudential* case, was that all activities occurring within the bargaining context are inferential to the determination of good faith. This is characterized as the "totality-of-conduct" view. Section 10(e) of the Act provides that, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Mr. Justice Frankfurter, while expressing his concurrence that the "per se" doc-

trine should be rejected, also takes issue with the Court's holding that unprotected activities should be of no evidentiary significance in the determination of bargaining collectively in good faith. He would remand to the Board for opportunity to introduce further evidence to support the charge of bargaining in bad faith. Such an approach would permit all factors within the bargaining context to be weighed by the trier of fact.

In each of the three cases herein reviewed there was no suggestion by the company that the union refused to negotiate. It was contended, however, in each that the extraneous acts evidenced a desire not to bargain in good faith. Only the Board, in each instance urged that the parties must, while in the bargaining context, in their every contact engage in fair dealings with the other. There is some basis to this argument. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (where the per se doctrine was applied to an employer). But the *Truitt* case is distinguishable in that the acts complained of related to occurrences at the bargaining table concerning one of the mandatory subjects of collective bargaining, that is, wages.

In sharp contrast to the Board's holding is the majority opinion in the principal case. The Court held the activities to be of no probative relevance. This decision appears to negative even the possibility that such unprotected acts evidence a lack of faith. Since 1943, the bargainor's subjective state of mind has been tested by applying the criterion of how an ordinary prudent man who sincerely desires to make an effort to bargain with the certified representative would act. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943). Such a conclusion revealing a state of mind must necessarily be supported by inferences drawn from both external occurrences surrounding the bargaining as well as those evidenced at the bargaining table. *Cf., Universal Camera Corp v. NLRB*, 340 U.S. 474 (1957). The majority decision in the *Prudential* case, therefore, appears to go too far in the other direction in that it precludes the Board, which was vested by the Act as the trier of fact, from utilizing the presence of factors that should influence its decision. So while the Board would legislate an undue expansion of its powers, it appears, in like measure, that the Court has substituted its own judgment for Congress' and effected a contraction of the Board's power. Justice Frankfurter appears to have expressed the more reasonable holding which is more in line with the historical definition of good faith. Although in accord with the majority that the

subjective interpretation of good faith be preserved, he also would permit the Board to continue to utilize all relevant acts by the parties as inferences of good faith, or the lack of it, in bargaining.

C. H. H., II

TRIAL—UNINTENDED COURTROOM INFLUENCE—WHEN NEW TRIAL WARRANTED.—In the trial of an action under the Federal Employers' Liability Act by an employee against the railroad for the loss of an eye suffered in the course of employment, a blind man, carrying a cane and a cigar box, entered the courtroom near the close of *D*'s case, and took a seat immediately behind one in which *P* was seated. The blind man entered the courtroom of his own volition and was not intentionally brought there for the purpose of influencing the jury's verdict. *Held,* reversing judgment for *P* and remanding the case for retrial, that in order to warrant a new trial it is not necessary that such courtroom episodes be deliberately contrived for the purpose of creating sympathy for *P* or prejudice towards *D*, nor is it necessary that it be conclusively shown that members of the jury were actually influenced thereby. *Fitzpatrick v. St. Louis-San Francisco Ry.*, 327 S.W.2d 801 (Mo. 1959).

A "fair trial" contemplates that no outside influences shall be brought to bear upon the jury and that no evidence shall be considered by it other than that presented and admitted at trial. *Hinton v. Gallagher*, 190 Va. 421, 57 S.E.2d 131 (1950).

Where extrinsic factors are present, the effect of which may be to affect unduly the course of the jury's deliberation, the courts have acknowledged the wholly subjective nature of the problem and have granted considerable latitude to the discretion of the trial judge to control the incidents of the trial and his sound exercise thereof will not be disturbed unless clearly abused. *Boecking Constr. Co. v. Callen*, 321 P.2d 970 (Okla. 1958); *Plank v. Summers*, 203 Md. 598, 102 A.2d 262 (1954).

The courts have often been confronted with a dilemma in such circumstances in weighing the importance of the factors surrounding the prejudicial incident. Where the jury has been influenced by irrelevant events, injustice may result from allowing the verdict to stand, but, conversely, a miscarriage of justice to the successful party may result from setting aside the verdict. The latter is especially true where the reprehensible act was without the knowledge or beyond the control of the prevailing party in the action.